

IN THE
Supreme Court of the United States
October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
against

ANTHONY PETRALIA,
Petitioner.

On Petition for writ of Certiorari to the Court of Appeals
and Appellate Division, Second Department, of the
Supreme Court of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

1. Whether a finding of probable cause to arrest may be based on the arresting officer's testimony that he relied on information from an undercover police officer who reported that he had just purchased drugs from the defendant.

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Statement of the Case

A team of New York City police officers engaged in a "buy or bust" operation in which an undercover officer buys drugs from street dealers while "back up" officers follow the sellers and arrest them some distance away, after the undercover officer informs them that a sale has been completed and describes or identifies the seller. At approximately 4:30 p.m. that day, one of the back-up officers was notified on a police radio by the undercover officer that he had just purchased heroin from an individual whom he described in detail.

The back-up officer followed the individual and apprehended him. The officer recovered "previously recorded buy money" and glassine envelopes containing white powder which proved to be heroin. The defendant was indicted and moved to suppress the evidence seized at the time of his arrest.

At the hearing only the back-up officer, who related the above events, testified. The hearing court granted the motion to suppress because the undercover officer did not testify. The Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed this decision. The Court of Appeals of the State of New York reversed, ruling that direct testimony by the undercover officer was not necessary to establish probable cause.

ARGUMENT

The testimony of the arresting back-up officer is sufficient to establish probable cause for arrest at the suppression hearing.

This Court has held in *Whitely v. Warden*, 401 U.S. 560, 567 (1977) that an arresting officer who relied on a radio bulletin that there was a warrant for the defendant's arrest was entitled to act on the strength of that bulletin:

"Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume, that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause."

In *Whitely*, of course, this Court recognized that a defendant may challenge whether the original source of the information had probable cause. There, the communicating police officer, had acted as a conduit for an unknown source whose information did not establish probable cause and did not improve in quality merely because it had been relayed from one officer to another. In the present case, on the other hand the arrest was not based on insufficient information from an unknown source of unknown reliability. Rather, the arresting officer relied on information from another officer who had personally witnessed the defendant commit the crime just prior to the radio transmission. Certainly, an undercover officer's observations of the crime minutes before the arrest more than satisfy both the "two pronged test" and "totality of the circumstances" approach enunciated in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Illinois v. Gates*, 104 U.S. 33 (1983) respectively.

Under these circumstances, testimony by one of the officers involved in the operation would, if credited, establish probable cause for the arrest and there is no need for the People to also produce the undercover officer. As this court noted in *United States v. Ventresca*, 380 U.S. 102, 111 (1965):

"Observations of fellow officers of the Government engaged in common investigation are plainly a reliable basis for a warrant applied for by one of their numbers."

Although that case dealt with a warrant, the same analysis applies here. The New York State Court of Appeals properly recognized that there may be cases in which evidence

presented at the hearing raises substantial issues relating to the validity of the information underlying the arrest, creating a need for testimony by the source. However, no such issue was raised in the present case. A *per se* rule requiring the undercover to appear in every instance is unwarranted and could jeopardize the officer's safety or on going investigations.

The balance struck by the Court of Appeals is correct as a matter of constitutional law and policy. Its judgment should not be reviewed.

Conclusion

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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